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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

BARBARA ZAMLEN, et. al.,

Petitioners,

v.

CITY OF CLEVELAND, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Seventh Amendment rights are abrogated when a court grants a motion for directed verdict as to a claim of discrimination brought under 42 U.S.C. § 1983 at the conclusion of plaintiffs' case in chief although plaintiffs have presented statistical evidence showing gross disparities as well as other anecdotal evidence sufficient to state a prima facie case of discrimination?

2. Whether a defendant in a Title VII disparate impact case has failed to meet its burden of production when plaintiffs have effectively discredited the evidence of job-relatedness presented by the defendant?

3. Whether a physical examination for entry-level firefighters which tests primarily for abilities that, according to the tester's own job analysis, are not required, and which causes the most severe disparate impact possible upon women applicants, violates Title VII?

LIST OF PARTIES

Petitioners are Barbara Zamlen, Charlene Cuffari, Sharon Pirosko, Leana Adkins, Jennifer Garrucio, Diane Horne, Concetta Zingale, Denise Campbell and the class they represent, i.e., all women who unsuccessfully applied for entry-level firefighter positions with the City of Cleveland in 1983.

Respondents are the City of Cleveland; George Voinovich, Mayor; Reginald Turner, Director, Department of Public Safety; Thomas Skulina, President, Civil Service Commission; Edmund J. Turk, Vice-President, Civil Service Commission; Irene M. Morrow, Secretary, Civil Service Commission; Nancy Oliver and Solomon Harge, Civil Service Commission members; Karl Schneider, Personnel Administrator, Civil Service Commission; James McNamee, Fire Chief for the City.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....iii

OPINIONS BELOW.....2

JURISDICTION.....3

STATUTES INVOLVED.....4

STATEMENT OF THE CASE.....5

REASONS FOR GRANTING THE WRIT.....17

I. THE SIXTH CIRCUIT'S STANDARD FOR DETERMINING WHETHER PETITIONERS HAD MADE A PRIMA FACIE CASE IS CONTRARY TO THAT OF OTHER CIRCUITS AND HAS WORKED TO DENY PETITIONERS' SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.....17

II. IN AFFIRMING THE DISTRICT COURT'S PERFUNCTORY APPROVAL OF THE CITY'S FIREFIGHTER SELECTION PROCEDURE THE SIXTH CIRCUIT MISAPPLIED THE INSTRUCTIONS OF THIS COURT IN WARDS COVE PACKING CO., INC. V. ATONIO 28

A. Guidance From This Court Is Needed As To The Proper Standard To Apply To Determine Whether A Title VII Defendant In A Disparate Impact Case Has Met Its Burden Of Production Of Evidence Of Job-Relatedness And Whether Such Evidence Has Been Rebutted.....28

B. The City's Evidence Of Validity Was Conclusively Rebutted By Petitioners.....31

C. The Decision Of The Sixth Circuit, If Allowed To Stand, Will Have Serious Adverse Consequences On The Aspirations Of Women Who Wish To Become Firefighters.....41

CONCLUSION.....47

APPENDIX

Decision of the Sixth Circuit (on rehearing) (July 30 1990).....1A

Decision of the Sixth Circuit (June 11, 1990).....2A

Opinion of the District Court (May 27, 1988).....22A

TABLE OF AUTHORITITES

CASES:

Page

Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).....32

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, (1986).....19

Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985).....25

Berger v. Iron Workers Reinforced Rodmon Local 201, 843 F.2d 1395 (D.C. Cir. 1988) 32

Berkman v. City of New York, 536 F.Supp. 177 (E.D.N.Y. 1982), aff'd., 705 F.2d 584 (2d Cir. 1983).....20

Berkman v. City of New York, 812 F.2d 52 (2d Cir.), cert. denied, 108 S. Ct. 146 (1987)...14, 41, 42

Carmichael v. Birmingham Saw Works, 738 F.2d 1126 (11th Cir. 1984).....24

Castaneda v. Partida, 430 U.S. 482 (1977).....23

Curtis v. Loether, 415 U.S. 189 (1974)..18

EEOC v. Federal Reserve Bank, 698 F.2d 633, (4th Cir. 1983).....33

Page

Enseley Branch, N.A.A.C.P. v. Seibels, 616 F.2d 812 (5th Cir.) cert. denied, 449 U.S. 1061 (1980).....38

Guardians Association v. Civil Service Commission, 633 F.2d 232 (2d Cir. 1980).....35

Hazelwood School District v. United States, 433 U.S. 299 (1977).....23

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).....23

James v. Stockham Valves & Fittings Co., 559 F.2d 310 (1977), cert. denied, 424 U.S. 1034 (1978).....25

Lytle v. Household Manufacturing, Inc., _____ U.S. _____, 110 S. Ct. 1331.....18

McAlester v. United Air Lines, Inc.., 851 F.2d 1249 (10th Cir. 1988).....25

Mister v. Illinois Central Gulf R.R. Co., 832 F.2d 1427, cert. denied, 108 S. Ct. 1597(1987).....25

Ottaviani v. SUNY, 875 F.2d 365 (1989), cert. denied, 110 S.Ct. 721 (1990.....26

Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984).....24, 25

Southern Pacific Communication Co. v.AT&T, 740 F.2d 980, (D.C. Cir. 1984).....33

Page

Spurlock v. United Airlines, Inc.,
475 F.2d 216 (10th Cir. 1972).....14, 29

Texas Dept of Community v. Burdine,
450 U.S. 248 (1981).....30

United States and Firefighters for
Racial Equality v. City of St. Louis,
549 F.2d 506 (8th Cir. 1977).....35

Wards Cove Packing Co., Inc. v. Atonio,
490 U.S. 642, 109 S. Ct. 2115
(1989).....16, 29, 30, 43

STATUTES:

Title 28 U.S.C.

Section 1254(1).....3

Title 42 U.S.C.

Section 1983.....4

Sections 2000e-2.....4

OTHER AUTHORITY:

EEOC Uniform Guidelines on Employee
Selection, 29 C.F.R. §1607.....33

Colker, "Rank-Order Physical Abilities
Selection Devices for Traditionally
Male Occupations as Gender-Based
Employment Discrimination,"
19 U.C. Davis L.R. 761 (1986).....43

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PETITION FOR A WRIT OF CERTIORARI
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The petitioners, Barbara Zamlen, et al., respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, on rehearing, dated July 30, 1990, has not been officially reported and is reprinted at pp. 1A-2A of the Appendix to this Petition.

The opinion of the United States Court of Appeals for the Sixth Circuit, dated June 11, 1990 is reported at 906 F.2d 209 (6th Circuit 1990), and is reprinted at pp. 3A-22A of the Appendix to this Petition.

The Opinion of the United States District Court for the Northern District of Ohio, dated May 27, 1988, is reported at 686 F.Supp 631 (N.D. Ohio 1988), and is reprinted beginning at p. 23A of the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on June 11, 1990, affirming the decision of the United States District Court for the Northern District of Ohio. On July 30, 1990, the United States Court of Appeals for the Sixth Circuit denied petitioner's timely petition on rehearing en banc.

Petitioners' Motion for Application for Extension of Time to File for a Writ of Certiorari was granted by Justice Stevens of this Court on October 22, 1990.

The jurisdiction of this Court to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked under 28 U.S.C. §1254(1) (1982).

STATUTES INVOLVED

This case involves 42 U.S.C. §1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This case also involves 42 U.S.C. §§2000e-2, which provides in relevant part:

> a. It shall be an unlawful employment practice for an employer --
>
> 1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges

> of employment because of such individual's race, color, religion, sex, or national origin; or
>
> 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

As of 1983, Respondent, City of Cleveland (hereinafter "City"), had never hired a female firefighter. That year Petitioners, Barbara Zamlen, Charlene Cuffari, Sharon Pirosko, Leana Adkins, Jennifer Garrucio, Concetta Zingale, Diane Horne and Denise Campbell applied for and were tested for positions as entry-level firefighters. None of the Petitioners

received scores high enough to place them in a position on the eligibility list from which they could realistically expect to be hired. Nor did any other woman. Thus, absent this litigation, based on the results of its 1983 entry-level examination for firefighters, the City would have maintained its Fire Department as an exclusively male enclave.

To design, administer and score its 1983 firefighter examination, the City hired Dr. Norman Henderson, the same person who had been in charge of the City's firefighter examinations in 1977 and 1980 and its examination for Emergency Medical Technicians in 1983. Not one woman had been hired as a result of those examinations.[1]

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[1]In fact, all twelve of the women who took the 1983 emergency medical technician exam designed by Dr. Henderson had failed because of a particular event on the test.

The results of the 1983 firefighter examination were consistent with this pattern: of the 1,927 males who began the testing process, 1,069 made it to the eligibility list. Of the 285 females who were tested, only 29 received passing scores placing them on the eligibility list. More importantly, the City ranked applicants according to their test scores, and the highest ranking woman on the list was at position 334. Because of the limited number of openings to be filled, it was virtually impossible for any woman to be hired under the City's top-down selection system. Thus, the result of the City's selection system was that the number of females who would be hired as firefighters would again be zero.

On June 14, 1983, Petitioners filed this class action. The action was brought on behalf of the named petitioners and the

class consisting of all women who unsuccessfully applied for positions as entry-level firefighters for the City in 1983. Petitioners asserted that both the physical and written sections of the 1983 examination had an adverse impact on female applicants in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et. seq. Petitioners also raised claims under 42 U.S.C. §1983, alleging violations of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, and pendent state law claims.

The United States Government filed a second, similar suit alleging a pattern and practice of discrimination against women by the City in the hiring of firefighters. The Government challenged both the 1980 and 1983 physical agility examinations for firefighters. The two cases

were consolidated for trial. The primary defense raised by the City in both cases was the job-relatedness of the selection procedure.

On December 21, 1983, the District Court granted a preliminary injunction prohibiting the City from any further hiring off the 1983 eligibility list until further order of the Court. On January 2, 1985, the City filed a Motion for Limited Relief from the Preliminary Injunction. Based upon an agreement between the class plaintiffs and the City and subject to stipulated conditions, the Court issued an Interim Order dissolving the Preliminary Injunction. As part of this settlement, the City hired ten women from the eligibility list as firefighters.

By order January 30, 1986, a class was certified of all women who sought positions with the City as entry-level

firefighters from 1983 to the date of the order as well as all females who would apply for that position in the future.

Trial of the consolidated cases began April 6, 1987. The §1985 claim was dismissed prior to trial.[2] The claims of the class Plaintiffs under §1983 and common law were tried to a jury. The Title VII claims of both the class plaintiffs and the Government were tried to the Court. The class plaintiffs' case in chief was combined with that of the Government.

Statistical evidence of the disparate impact on women applicants of the 1980 and 1983 Cleveland Firefighters examinations was introduced through the testimony of Martina Dusenberry, a mathematical statis-

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[2]During the trial, the class Plaintiffs voluntarily dismissed as Defendants the City officials in their individual capacities. Prior to trial, Dr. Norman Henderson, who was a named Defendant in the class action, was dismissed pursuant to the terms of a settlement with the class Plaintiffs.

tician in the Employment Litigation Section, Civil Rights Division, U.S. Department of Justice. Ms. Dusenberry did a number of statistical calculations regarding the 1983 firefighters examinations. She testified that the disparate impact upon women of the 1983 firefighter test was highly statistically significant with a standard deviation of 6.76. (TR 110) She also testified that the probability of only 29 females scoring high enough to place on the eligibility list were one in ten to the eleventh power, or one in ten billion.

In addition, Plaintiffs presented other evidence that the City intended the disparate impact, such as: the adoption of an Affirmative Action Plain without <u>any</u> goals for hiring women as firefighters despite a recognition of the gross disparity in the Fire Department; the hiring of

Dr. Henderson, whose previous tests had a severe disparate impact on women, as test designer; the addition of an event to the physical examination shortly before the test date despite - or, perhaps, because of - the knowledge of the disparate impact it would have on women; the failure to announce test-events in advance, contrary to previous practice. Another important item of evidence, that the women who had been hired as a result of the interim agreement in 1985 had been performing as firefighters quite well,[3] was excluded by the trial court.

Plaintiffs did not present all their evidence in the case in chief because much of their evidence consisted of expert testimony which would be used as rebuttal

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[3]Indeed, as the fire chief indicated, some were performing better than their male counterparts who had been ranked higher on the eligibility list.

evidence in the Title VII case being tried jointly with the Government.

At the end of Plaintiffs' case, the City moved for directed verdict as to all counts of the Complaint. The trial court, after hearing the argument, determined that it had discretion to ignore the Title VII three-tiered approach to proof in deciding a §1983 case, and could require for Plaintiff's prima facie case evidence beyond the gross statistical disparity demonstrated by Plaintiffs. The Court then ruled that Plaintiffs' evidence was insufficient to allow the jury to infer an intent to discriminate and dismissed Plaintiffs' §1983 claim.[4]

The City's motion was overruled as to the Title VII claims of both Petitioners and the Government and the trial proceeded

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[4]The court also dismissed Plaintiffs' common law fraud claim.

on those claims. The remainder of the trial was primarily devoted to testimony of expert witnesses concerning the validity of the City's test.

The trial concluded on May 18, 1987. The parties submitted proposed findings of fact and conclusions of law. On May 27, 1988, the District Court issued a Memorandum of Opinion and Findings of Fact and Conclusions of Law (hereinafter "Opinion") finding against both the Plaintiffs and against the Government. In its Opinion, the District Court relied on Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) in holding the City to a lesser burden of showing the job-relatedness of its exam because of the public safety aspects of the job of firefighter. In addition, the court relied on Berkman v. City of New York, 812 F.2d 52 (2d Cir.), cert. denied, 108 S. Ct. 146 (1987)

("Berkman II"), where the court held that a city was not required to test candidates for firefighter positions for their aerobic capacity. The District Court held that the City of Cleveland's failure to measure the stamina of applicants did not negate the validity of the examination. The Court pronounced the examination to be valid according to the content, criterion and construct theories of validity.

Petitioners filed their Notice of Appeal on June 24, 1988. The United States filed a Notice of Appeal on July 27, 1988. The Government's appeal was dismissed as untimely by the Sixth Circuit Court of Appeals on October 26, 1988.

The Sixth Circuit affirmed the District Court on all points. While finding the exclusion of the testimony of female firefighters concerning their jobs and their performance to be improper, the

Court of Appeals held that the exclusion was not substantially prejudicial. On the directed verdict issue, the court held that Petitioners' statistical evidence was "at best, amorphous" and did not sufficiently demonstrate an intent to discriminate.

Regarding the Title VII claim, the Court of Appeals, following this Court's decision in Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115 (1989), which had been issued subsequent to the District Court's decision, held that the City simply had a burden of production of evidence of job-relatedness, which was less than even the Spurlock doctrine required. The Court then held that the City had met this burden, relying heavily on Berkman.

Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing

En Banc on the issues of methods for proceeding in a Title VII disparate impact case and on the abrogation of Petitioners' Seventh Amendment rights by the directed verdict on the § 1983 claim. On July 20, 1990, the Sixth Circuit denied the petition for rehearing en banc.

Petitioners' application for extension of time within which to file a petition for writ of certiorari was granted by Justice Stevens on October 22, 1990.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S STANDARD FOR DETERMINING WHETHER PETITIONERS HAD MADE A PRIMA FACIE CASE IS CONTRARY TO THAT OF OTHER CIRCUITS AND HAS WORKED TO DENY PETITIONERS' SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY

The Sixth Circuit's interpretation of the evidence needed to make out a prima facie claim under 42 U.S.C. §1983 for intentional discrimination results in the deprivation of Seventh Amendment rights.

In Lytle v. Household Manufacturing, Inc., __ U.S. ___, 110 S. Ct. 1331 (1990), this Court held that the Seventh Amendment precludes according collateral-estoppel effect to a district court's determination of issues common to equitable and legal claims where the court had resolved the Title VII equitable claims after erroneously dismissing the §1983 legal claims. This Court, citing Curtis v. Loether, 415 U.S. 189, 196, 94 S.Ct. 1005, 1009 (1974), noted that when legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact." ___ U.S. at _____, 110 S. Ct. at 1335. This Court further noted that a new trial before a jury was "essential to vindicating Lytle's Seventh Amendment rights." _____ U.S. at ____, 110 S.

Ct. at 1337.[5]

In the instant case, Petitioners similarly lost their Seventh Amendment rights when the lower court decided that they had to present all evidence of intent in their prima facie §1983 case, despite the fact it also was being tried under Title VII in a consolidated case brought by the United States and despite the fact that the overwhelming statistical evidence presented by Petitioners was sufficient - especially in light of other evidence

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[5]Respondent in Lytle also argued that remand was unnecessary because the district court would have directed a verdict in favor of respondent on the 1981 claims even if they had been litigated before a jury. The Court did not find this argument compelling and noted that in considering a motion for a directed verdict, "the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party." _____ U.S. at _____, 110 S. Ct. at 1338. Citing to Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), the Court quoted, "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."

presented - to make out a prima facie case of intentional discrimination.

The Sixth Circuit failed to acknowledge Lytle or the jury trial issue. In doing so, it refused to recognize the sanctity of this right. The right to a trial by jury is well-grounded in our nation's history and law and cannot be so summarily denied.

Petitioners established disparate impact through gross statistical disparities relying on applicant flow data as is typical in this sort of case. See, e.g., Berkman v. City of New York, 536 F.Supp. 177 (E.D.N.Y. 1982), affd., 705 F.2d 584 (2d Cir. 1983). The trial court did not criticize Petitioners' disparate impact statistics but required that Petitioners put on evidence beyond a prima facie

showing of substantial disparate impact.[6] Since some of the Petitioners' offer of proof of intent to discriminate under §1983 included rebuttal testimony to be offered by their experts, in requiring such evidence to be introduced as part of Petitioners' prima facie showing, the trial court would have Petitioners rebutting evidence the City had the burden of first producing according to traditional Title VII disparate impact analysis.

Petitioners were unfairly penalized

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[6] The Sixth Circuit misconstrued the reasoning of the District Court in granting the City's motion for a directed verdict as to the §1983 claim. The panel incorrectly assumed that the lower court granted the motion because Petitioners' evidence was insufficient to demonstrate intentional discrimination and that the lower court "concluded that the evidence presented was at best amorphous..." (Slip Op. at 10) However, nothing in the record or in the District Court's Opinion supports such an assumption and this characterization of the statistical proof amounted to a de novo finding of fact by the Court of Appeals. To the contrary, the lower Court found that the disparate impact of the City's firefighter examination was established.

by the trial court's view that they should ignore the accepted mode of proof of their Title VII claim - and that of the Government in this consolidated trial - and introduce that evidence outside its logical sequence. Petitioners should not have been forced to choose between compromising their and the Government's Title VII claims and dismissal of their §1983 claim when they had presented sufficient statistical and anecdotal evidence of intentional discrimination to make a prima facie case.

Precedent of this Court and other circuits clearly stands for the proposition that a prima facie showing under §1983 can be based solely on statistics. Moreover, the fact that the City had never hired a woman as a firefighter prior to this lawsuit and would not have based on the 1983 firefighter examination adds up

to the "inexorable zero" sufficient to support an intentional discrimination claim. International Brotherhood of Teamsters v. United States, 431 U.S. 324, n.23 (1977).

This Court has held that statistical evidence alone may show a discriminatory purpose if the disparity demonstrated is so gross as to lead to an inference of discrimination. Hazelwood School District v. United States, 433 U.S. 299 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Castaneda v. Partida, 430 U.S. 482 (1977).

The District Court seemed to ignore this precept and simply held Petitioners evidence insufficient without explaining the basis for this conclusion. The Sixth Circuit acknowledged the possibility that statistical evidence can show discriminatory purpose but did not explain why it

deemed the blatant disparity presented by the figures in this case to be insufficient. By casually declaring Plaintiffs' evidence to be "amorphous" the Sixth Circuit has rubber-stamped the district court's precipitous denial of Plaintiffs' rights under the Seventh Amendment.

The trial court's insistence on additional evidence is in stark contrast to the approach of other circuits. For instance, in Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), the court held that as long as plaintiffs' statistical evidence is focused on the proper labor pool and is statistically significant, anecdotal evidence is not required. 738 F.2d at 1278.

While the statistics must be sufficiently strong to support an inference of intent, Carmichael v. Birmingham Saw Works, 738 F.2d 1126 (11th Cir. 1984);

James v. Stockham Valves & Fittings Co., 559 F.2d 310 (1977), cert. denied, 434 U.S. 1034 (1978); they need not be gross or overwhelming. Segar v. Smith, 738 F.2d at 1279. For instance, a sample size that was quite small compared to the numbers presented in this case was deemed sufficiently probative by the Tenth Circuit in McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988).

The Seventh Circuit has likewise found evidence of intent in statistical disparities substantially less than or similar to that presented by Petitioners in this case. See, Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985) (thirty-one meat cutters all male, fifteen meat wrappers all female); Mister v. Illinois Central Gulf R.R. Co., 832 F.2d 1427, cert. denied, 108 S. Ct. 1597 (1987) (not one of 150 black applicants hired)

In the latter case, Plaintiffs' expert testified that the probability of the disparity being the result of chance was one in a million. 832 F.2d at 1429. The court stated that "[i]t is hard to imagine a stronger case, short of an announcement of discrimination." Ibid. This action, with its disparity probability of one in ten billion, may be that case. Yet, the lower courts inexplicably held that petitioners had not presented a prima facie case.

The question of whether there is a minimum threshold of statistical significance mandating a finding of a prima facie case was recently addressed in Ottaviani v. SUNY, 875 F.2d 365 (1989), cert. denied, 110 S.Ct. 721 (1990). The court there declined to find such a mandate in the case of a statistical disparity of two

standard deviations.[7]

This Court, if it grants the writ, need not set a minimum threshold. What is needed, however, is an indication to the lower courts that a disparity as significant as that presented in this case, with a standard deviation of 6.76 cannot simply be ignored when to do so denies Seventh Amendment rights.

The evidence before the District Court established the severe and substantial disparate impact of the 1983 examination. (JA 52S-534). The question raised by the lower courts' dismissal of statistical evidence of this magnitude is: if the odds that gender was not a factor in the pass rate of the 1983 exam are one in ten

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[7]The court's pronouncement on this point was unnecessary to the determination of the case since a full trial of the merits was held and the question of whether a prima facie case had been established was rendered moot. 875 F.2d at 373.

billion, yet this statistic is deemed "insufficient," what statistical showing will ever be deemed sufficient for a §1983 prima facie case?

To hold the statistical showing in this case insufficient to state a prima facie case is effectively to hold that a trial court has complete discretion to make its own determination as to the ultimate factual question and to impinge upon the province of the jury in contravention of the Seventh Amendment.

II. IN AFFIRMING THE DISTRICT COURT'S PERFUNCTORY APPROVAL OF THE CITY'S FIREFIGHTER SELECTION PROCEDURE THE SIXTH CIRCUIT MISAPPLIED THE INSTRUCTIONS OF THIS COURT IN WARDS COVE PACKING CO., INC. V. ATONIO

A. Guidance From This Court Is Needed As To The Proper Standard To Apply To Determine Whether A Title VII Defendant In A Disparate Impact Case Has Met Its Burden Of Production Of Evidence Of Job-Relatedness And Whether Such Evidence Has Been Rebutted

This Court's decision in Wards Cove Packing Co., Inc, v. Atonio, 490 U.S. 642, 109 U.S. 2115 (1989) was issued while this case was on appeal. As the Sixth Circuit correctly pointed out, it is now clear that pursuant to Atonio, in a normal disparate impact case the burden of production only, not of proof, shifts to the defendant once the plaintiff has presented a prima facie case of discrimination.[8] Prior to Wards Cove many courts had held that the burden of proof switched to defendants.[9] Thus, for many courts the approach to the evidence of job-relatedness has changed and the degree of scrutiny to be applied to a defendant's evidence needs to be further delineated.

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[8]Thus, as the Sixth Circuit indicated, the doctrine announced in Spurlock v. United Airline, Inc., 475 F.2d 216 (10th Cir. 1972), whatever its merits, is no longer applicable.

[9]See, e.g., Wards Cove, 462 U.S. at ____, 109 S. Ct. at 2130 n.14 (dissenting opinion).

This case presents an opportunity for this Court to address the question of how the evidence presented by a defendant to satisfy its burden of production is to be analyzed. In Wards Cove, this Court clearly indicated that the mere act of producing some evidence to justify a practice that has a disparate impact does not end the case. A "reasoned review" of the employer's justification for the procedure causing the diparate impact should take place. 109 S. Ct. at 2126. The Court cautioned against allowing too low a standard of review. Ibid. It would follow that a plaintiff in such a situation has the opportunity to rebut the evidence produced and, if the plaintiff successfully discredits the defendant's evidence, the plaintiff should obtain judgment. Cf., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 n.10

(1981).

In the instant case, the testimony presented by Petitioners' experts successfully rebutted the City's evidence of validity. Nevertheless, as shown below, the trial and appellate courts ignored this rebuttal evidence and simply accepted the City's validity attempts without any serious questioning. Thus, the reasoned review required by Wards Cove did not take place. A determination on that issue by this Court will provide further instruction to lower courts as to how evidence of business justification is to be evaluated.

B. The City's Evidence Of Validity Was Conclusively Rebutted By Petitioners

The City's evidence of validity primarily consisted of a "Technical Report" by Dr. Henderson in which he purported to demonstrate the validity of his

examination under both the content and criterion validity theories. This report, originally begun in 1983 after the examination, was not completed and produced until 1986, some three years after the examination was given. The objectivity of such a report, prepared specifically for litigation by a person with an obvious interest in its approval by a court, is highly questionable. Albermarle Paper Co. v. Moody, 422 U.S. 405, 433 n.32 (1975).

The panel decision adopts the factual statement of the District Court as to the evidence submitted by the City. Yet, many of those statements of fact have no support in the record.[10] In the instant

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[10]The Findings of Fact of the Opinion of the District Court contain no references to the record and in fact, were largely taken verbatim from the City's Proposed Findings of Fact which also do not refer to the record. Findings adopted directly from a party should be viewed "with particular, even painstaking, care." Berger v. Iron workers Reinforced Rodmon Local 201, 843 F.2d 1395 (D.C. Cir.

case, the record shows that the District Court did not adequately evaluate the evidence of validity presented by the City in support of its selection procedure especially considering the credibility concerns presented by Dr. Henderson's post hoc validation attempts which are so inherently suspect. Such a failure to evaluate the evidence is inconsistent with the duty to apply a reasoned review.

According to EEOC's Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607, the City was required to show that its selection procedure was "operationally validated." In other words, the City was

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1988), quoting Southern Pacific Communication Co. v. AT&T, 740 F.2d 980, 984 (D.C. Cir. 1984). Such findings demand careful scrutiny by the reviewing court and must be more narrowly examined. EEOC v. Federal Reserve Bank, 698 F.2d 633, 639-642 (4th Cir. 1983), rev'd on other grounds sub. nom. Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984. The Sixth Circuit decision is devoid of any indication of such scrutiny.

required to show that a higher score would likely result in better job performance. The Guidelines provide for three types of validation: content, construct and criterion. The District Court held that the City succeeded in showing that its examination was valid by all three methods and the Court of Appeals agreed. However, the record is lacking in support for this conclusion.

One of the most glaring deficiencies in both the lower court opinions in this regard is the conclusion that the examination was construct valid in light of the fact that the City presented no evidence of construct validity.[11] Both the Dis-

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[11] The Sixth Circuit decision refers to Dr. Henderson's technical report in which test scores were compared with ratings of active firefighters as proof of construct validity. However, that study represented Dr. Henderson's attempt to prove criterion validity, which is an entirely different method of validation. Dr. Henderson's report does not purport to present evidence of construct validity.

trict Court and the Court of Appeals have simply failed to address this deficiency. The finding that the examination was construct valid is a clear indication of the failure of both the trial and appellate courts to apply even a minimal level of scrutiny to the evidence presented by the City.

Content validity is appropriate where the content of the test closely approximates tasks actually performed on the job. Content validity should be based on a thorough job analysis identifying the important work behaviors and knowledge, skills and abilities necessary for successful job performance. Guardians Association v. Civil Service Commission, 633 F.2d 232 (2d Cir. 1980). To be content valid, the exam must measure the abilities and traits shown by the job analysis to be important. United States and Firefighters

for Racial Equality v. City of St. Louis, 549 F. 2d 506 (8th Cir. 1977).

Dr. Henderson did perform a job analysis prior to the development of the 1983 firefighter examination. Based on questionnaires filled out by active firefighters, abilities necessary for firefighting were identified and ranked in order of importance. The firefighters ranked hand-eye coordination and balance at the top and relative strength and relative power (speed) at the bottom.

According to the City's expert's job analysis, of the twelve physical abilities ranked, speed is twelfth in importance. (See Table 2 of Technical report, p. 32, JA 1729) Yet two of the events on the physical examination were scored according to the time in which they were performed. Event two required applicants, in part, to sprint up and down stairs carrying fire

equipment. The faster one ran through the event, the higher one's score. Event three, the dummy drag, was supposedly meant to replicate the drag rescue of a victim from a smoke-filled room but was also timed and scored the same way as event two.

Neither event is representative of the way in which firefighters perform their job.[12] The record is lacking in the kind of evidence that would support the emphasis on speed. Dr. Henderson admitted at trial that he had no empirical evidence to justify the examina-tion's extreme reliance on speed. Moreover, it directly contradicts his own job analysis.

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[12]Indeed, at the Cleveland Fire Training academy, cadets are instructed not to run as fast as possible because it would be unsafe to do so. (JA 1250-1251, 1139) The same is true of the dummy drag. As Dr. Henderson himself testified at trial, firefighters do not and are not trained to run into smoke-filled rooms to perform rescues. (JA 819-906)

Though these events "look like" fire-fighting tasks, the over-emphasis on speed meant that they could not be content valid.

The first part of the test, the barbell lift, is even more obviously flawed. At trial, Dr. Henderson admitted that this event was added to measure absolute muscular endurance of shoulder and upper limbs and not to replicate any tasks performed by firefighters.

Criterion-related validity requires empirical data demonstrating that the selection procedure is predictive of or significantly correlated with a criterion which represents an important work behavior, and that the correlations are practically significant. Enseley Branch, N.A.A.C.P. v. Seibels, 616 F.2d 812 (5th Cir), cert. denied, 449 U.S. 1061 (1980). As shown at trial through testimony of the

only statistical expert to testify, Dr. Henderson's correlations overstate the relationship between the physical performance test and job performance. The effect of the procedure used by Dr. Henderson to select the sample of 113 was to produce a non-representative or biased sample that results in an overstatement of the correlation between the test instrument and job performance.[13] (JA 1336-1341,

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[13]Dr. Henderson tended to choose individuals whose work behaviors were at the extremes, i.e. very good or very poor. This selection procedure had the effect of overstating the true relationship between the test and the criterion of job performance. (JA 1335)

Plaintiffs' expert statistician, Dr. Bernard Siskin, independently determined that the sample of 113 was not representative of the larger population. Dr. Siskin compared the results of this group to the population of 277 and found that the subsample results are consistently 2 1/2 times as large as what the results would have been looking at the full population, and the difference is not attributable to chance. (JA 1335-36, 1277-78; Government Exhibits 27C, 23EE, 27J and 28F)

It would have been possible for Dr. Henderson to compensate statistically for the non-representativeness of the sample prior to performing statistical analyses, but he did

1277-78; Government Exhibits 28F, 28G, 28H 27C, 23EE, 27J, 23DD, 27D.) When the proper statistical adjustment is made for non-representativeness of the sample there is absolutely no evidence of a statistically significant correlation between the 1983 physical performance examination and job performance or any evidence that test performance predicts job performance any better than chance. (JA 1344-45)

Neither the District Court or the Sixth Circuit addressed these statistical inadequacies in Dr. Henderson's criterion-validity study. Again, this wholesale acceptance of Dr. Henderson's study is inexplicable when viewed in light of the substantial criticisms by both Dr. Siskin, the only expert statistician to testify at trial, and Dr. Raymond Mendel, an industrial psychologist. Thus, the holding of

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not do so. (JA 1356-57)

the District Court that the City showed the examination to be criterion valid, and the affirmance of that holding by the Sixth Circuit, cannot be squared with the evidence and can only be the result of according the City's evidence far more deference than is proper.

C. The Decision Of The Sixth Circuit, If Allowed To Stand, Will Have Serious Consequences On The Aspirations Of Women Who Wish To Become Firefighters

Both opinions below recognized that the City's 1983 firefighter exam failed to measure aerobic qualities that are important to effective firefighting. Both opinions, however, relied on Berkman II, 812 F.2d 52, to hold that the City's failure to test for these attributes does not invalidate the examination.

In Berkman II the Second Circuit found that evidence in the record of that

case showed that the test accurately measured the attributes necessary for firefighters to perform their jobs. No such evidence was presented in this case. There was no evidence presented showing that the ability to sprint faster than another person indicates the ability to better perform firefighting tasks in the manner in which they are actually performed - even in emergency situations. Whatever the record in Berkman may have shown, the record in this case simply does not justify a finding of validity for an examination that departs so drastically from the job requirements as outlined in the City's own job analysis.

Moreover, the reliance of the District Court and the Sixth Circuit on dicta in Berkman II concerning the "self-evident" necessity for speed and strength was improper and contrary to the requirement

of this Court for a reasoned review of the evidence of job-relatedness. Wards Cove, 109 S. Ct. at 2126.

At the heart of this case is the selection of candidates by rank order based on scores from a physical agility test which stresses aerobic measures of strength and speed. It is inevitable, given such an exam, that no women ranked high enough to have a realistic chance of being hired when the selection is made top down on the eligibility list. Thus, the use of such a selection system has a devastating effect on the employment opportunities of women.[14]

Given this foreseeable impact,[15] an

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[14]Colker, "Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination," 19 U.C. Davis L.R. 761, 779 (1986).

[15]Dr. McArdle, an exercise physiologist, testified at trial that if he were asked to construct a pysical examination that would

employer should not be allowed to base its selection procedure on unfounded assumptions. In order to select candidates in such a manner, given such inevitable disparate impact on women, the City should have been required to produce evidence showing that higher scores on the test vary directly with job performance. Both Petitioners and the Government presented expert testimony demonstrating that the City had not met this burden. The courts below, however, ignored this evidence. Instead they unquestioningly accepted the proposition that faster and stronger is better without any empirical evidence to support it.[16]

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cause the most severe disparate impact by gender, he would utilize the 1983 Cleveland test for entry level firefighters. (TR 2550-51)

[16]Similarly, the District Court's acceptance of the proposition that firefighters must be extremely physically fit is not supported. The evidence at trial showed that

Both the District Court and the Sixth Circuit ignored the most salient evidence that women are indeed qualified to perform the job of firefighting: women are doing the job in such cities as New York, Columbus, Seattle, etc. (TR 149-150) And, more directly on point, women are doing the job in Cleveland and are performing quite well, some even better than their male counterparts who were ranked higher on the eligibility list.[17] (TR 649)

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overweight firefighters in the busiest fire stations in the City can effectively perform their job. (TR 655-657) Nor are veteran firefighters individually timed to see how fast they can do specific firefighting tasks. (TR 593-594).

[17]After reviewing Plaintiff's proffer, the Sixth Circuit correctly noted that the female firefighters' testimony could be relevant to the central issue in the case - the validity of the selection device. (Slip Op. at 11) However, the panel then concluded that the improperly excluded evidence did not prejudice Plaintiffs' case because the evidence would be "substantially the same as that of the male firefighters who were allowed to testify on their behalf." (Slip Op. at 11-12) The Sixth Circuit was wrong on this point. The very

Due to the scoring system and use of rank ordering, the selection of firefighters by the City in 1983 was based on two sprinting events and one weightlifting contest. The examination was an athletic competition. By approving such an examination without real evidence demonstrating that sprinting and weightlifting measure abilities necessary for the job, the Sixth Circuit sends the message that municipalities can effectively maintain all-male fire department if they so choose. By granting review of the Sixth Circuit's decision, this Court can convey a different message: that a test that totally excludes women from firefighting jobs will be held to violate Title VII unless there

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reason why it was necessary to have the female firefighters testify is that ther description of a firefighters' day-to-day job duties would establish that the 1983 examination did not test for those duties. Their testimony would have directly contradicted that of the male firefighters.

is credible evidence that the test is sufficiently job-related to justify a result that runs so counter to the goals of Title VII.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

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